Some Nixon Tapes May Be Played in Pending Civil Suits

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Portions of former president Nixon's White House tapes must be produced as evidence in civil lawsuits as well as in criminal cases, the U.S. Court of Appeals ruled here yesterday.

The ruling is the first by an appellate court on attempts by the former chief executive to apply the so-called "presidential privilege" to the tapes in a civil suit. It means that plaintiffs in more than 10 pending suits against the former president—such as suits concerning the Nixon administration's wiretapping of government employees and newsmen—could now seek White House tapes in those cases.

R. Stan Mortenson, one of the attorneys representing former President Nixon in the case decided yesterday, said the ruling would be appealed to the U.S. Supreme Court.

Yesterday's ruling came in a suit filed by U.S. Rep. Ronald V. Dellums (D-Calif.) and about 1,200 persons arrested at the Capitol on May 5, 1971, during the antiwar Mayday demonstrations of that year.

The main portion of the suit has already been tried and resulted in a $12 million verdict against the U.S. Capitol Police force and others for alleged violations of the protesters' constitutional rights. That verdict itself is on appeal in a separate action.

However, the same suit was filed against former Attorney General John N. Mitchell in his alleged role of conspiring to have the demonstrators arrested. As a part of the suit, the attorneys for the protesters subpoenaed White House tapes for the period of April 16 through May 10, 1971, in which the Mayday demonstrations were discussed.

U.S. District Court Judge William B. Bryant ruled more than two years ago that the tapes must be turned over, but Nixon appealed the ruling. Meanwhile, Mitchell as severed from the case so it could proceed to trial against the other defendants.

Nixon's attorneys contended on appeal that the former President has a blanket claim of presidential privilege entitling him to refuse to turn over tapes in a civilcase and that, as an ex-president, Nixon had as much right to invoke the privilege as he did as a sitting President.

Although the U.S. Supreme Court had ruled in the Watergate criminal cases that a President does not have an absolute claim of privilege to invoke in a criminal case, it specifically left unanswered the question of forcing a President to present evidence in a civil case.

In an opinion issued yesterday, U.S. Circuit Judge Harold Leventhal, with Circuit Judge Spottswood Robinson III concurring, said:

". . . (T)here is also a strong constitutoinal value in the need for disclosure in order to provide the kind of enforcement of constitutional rights that is presented by a civil action for damages, at least where, as here, the action is tantamount to a charge of conspircy among high officers of government . . ."

They disputed claims that a ruling against the former President would "open the floodgates" for similar attempts to gain access to a President's most private conversations with his closest aides.

"The possibility of disclosure in such instances is not unlike the possibility of disclosure in criminal cases—the infrequent occassions of such disclosure militate against any substantial fear that the candor of presidential advisers will be imperiled," Leventhal wrote.

U.S. Circuit Judge George MacKinnon dissented from the majority opinion.

The court did not rule on whether an ex-President could invoke the presidential privilege, but said merely that if he did have the authority it should not be given as much weight as the invoking of the privilege by a sitting President.

The appellate court added strict guidelines under which the tapes are to be edited and distributed once they are turned over in the suit. It specified that a government archivist should first go through the material in the presence of someone representing Nixon, that a judge should review the material privately, and that it could be used only in connection with an in-court proceeding.